Yee Hock Lai & Anor v Unity Performance Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K–02–1976 OF 2011
BALIA YUSOF, LIM YEE LAN AND HAMID SULTAN JJCA
27 AUGUST 2013

Civil Procedure — Appeal — Interference by appellate court — Whether there was failure to consider contractual provisions and conduct of parties relating to contractual terms — Perverse judgment — Whether appellate interference warranted

Land Law — Housing developers — Sale and purchase agreement — Termination of — Whether there was effective termination of SPA — Whether termination complied with requirements of cl 9 of the SPA — Whether there was sufficient judicial appreciation of cl 9 of the SPA

The appellants/purchasers entered into a sale and purchase agreement ('the SPA') with the vendors of the property ('the respondents').The SPA was based on the format of Schedule G of the Housing Development (Control and Licensing) Act 1966 ('the Act'). The terms of the Act require the appellants to pay a 10% deposit upon the execution of the SPA, but in the instant case the parties agreed that the appellants would only pay RM500 as deposit with the balance to be paid at a subsequent date upon notification by the respondents. The appellants claimed that they had called and visited the respondents at various times on several occasions to check on the payment of the balance of the deposit but were told not pay until further notice. Subsequently the respondents terminated the SPA by way of a termination letter, which was sent by AR registered post to the wrong address. The appellants treated the said letter as a notice of demand and paid the balance of the 10% deposit monies. However, the respondents refused to accept the balance payment. Instead the respondents proposed to increase the sale price and informed the appellants that they would need to execute a new sale and purchase agreement which reflected the new purchase price of the property. The appellants filed an action against the respondents for breach of the terms of the Act. The appellants contended that the conduct of the respondents was mala fide. The High Court judge dismissed the appellants' claim and allowed the respondents' counterclaim. Hence this appeal wherein the appellants argued that time was not the essence of the contract. The appellants submitted that the respondents' conduct and delay in demanding the balance of the 10% deposit could be interpreted to mean that time was no longer of essence in the contract; and that if time was not an essence of the contract, the respondents were not entitled to

rescind the contract but only claim for damages. The appellants also relied on cl 9(2) of the SPA, which required the respondents to give the appellants at least 14 days notice in writing by AR registered post to rectify the occurrence of any breach.

Held, allowing the appeal with costs of RM15,000:

(1) The procedure for termination of the agreement was governed by cl 9 of the SPA. The respondents' termination notice in the present case did not satisfy the requirements of cl 9 of the SPA and also did not comply with the relevant notice period before effective termination. However, there was no judicial appreciation of cl 9 of the SPA by the High Court. Such failure to consider the contractual provisions and conduct of the parties relating to the contractual terms compromises the integrity of the decision making process and places the judgment as a perverse judgment requiring appellate intervention (see para 12).

(2) Hence the appeal was allowed subject to the payment of the full purchase price within four months (see para 13).

[Bahasa Malaysia summary

Perayu-perayu/pembeli-pembeli memasuki perjanjian jual beli ('PJB') dengan penjual hartanah ('responden-responden'). PJB adalah berdasarkan atas format Jadual G Akta Pemaju Perumahan (Kawalan dan Perlesenan) 1966 ('Akta'). Terma Akta mengkehendaki perayu-perayu membayar deposit 10% atas pelaksanaan PJB, tetapi dalam kes ini pihak-pihak bersetuju bahawa perayu-perayu hanya akan membayar RM500 sebagai deposit dengan baki dibayar pada tarikh berikutnya atas pemberitahuan responden-responden. Perayu-perayu mendakwa bahawa mereka telah memanggil dan berjumpa dengan responden-responden pada pelbagai masa beberapa kali untuk memeriksa atas bayaran baki deposit tetapi diberitahu untuk tidak membayar sehingga notis selanjutnya. Kemudiannya responden-responden menamatkan PJB tersebut melalui surat penamatan, yang mana dihantar melalui pos berdaftar AR kepada alamat yang salah. Perayu-perayu menganggap surat tersebut sebagai notis tuntutan dan membayar baki wang deposit 10% tersebut. Walau bagaimanapun, responden-responden menolak daripada menerima baki bayaran. Sebaliknya responden-responden mencadangkan untuk menaikkan harga jualan dan memberitahu perayu-perayu bahawa mereka akan perlu melaksanakan perjanjian jual beli yang baru yang mencerminkan harga belian baru hartanah tersebut. Perayu-perayu memfailkan tindakan terhadap responden-responden untuk kemungkiran terma Akta. Perayu-perayu berhujah bahawa tingkah laku responden-responden adalah mala fide. Hakim Mahkamah Tinggi menolak tuntutan perayu-perayu dan membenarkan tuntutan balas responden-responden. Maka rayuan ini di mana perayu-perayu berhujah bahawa masa bukan inti pati kontrak. Perayu-perayu berhujah bahawa tingkah

laku responden-responden dan kelewatan dalam menuntut baki deposit 10% tersebut boleh ditafsirkan bermaksud bahawa masa bukan lagi inti pati dalam kontrak; dan jika masa bukan inti pati kontrak, responden-responden tidak berhak untuk membatalkan kontrak tersebut tetapi hanya menuntut untuk ganti rugi. Perayu-perayu juga bergantung ke atas klausa 9(2) PJB, yang mengkehendaki responden-responden memberi perayu-perayu sekurang-kurangnya 14 hari notis bertulis melalui pos berdaftar AR untuk membetulkan terjadinya apa-apa kemungkiran.

Diputuskan, membenarkan rayuan dengan kos RM15,000:

(1) Prosedur untuk penamatan perjanjian dikawal oleh klausa 9 SPA. Notis penamatan responden-responden dalam kes ini tidak memenuhi kehendak klausa 9 PJB dan juga tidak memenuhi dengan tempoh notis yang relevan sebelum penamatan berkesan. Walau bagaimanapun, tiada penilaian kehakiman terhadap klausa 9 PJB oleh Mahkamah Tinggi. Kegagalan untuk mempertimbangkan peruntukan kontrak sedemikian dan tingkah laku pihak-pihak berkaitan terma-terma kontrak mengkompromi integriti proses membuat keputusan dan memberikan penghakiman sebagai penghakiman membantah mengkehendaki campur tangan mahkamah rayuan (lihat perenggan 12).

(2) Maka rayuan dibenarkan tertakluk kepada bayaran harga belian penuh dalam masa empat bulan (lihat perenggan 13).]

Notes

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1217–1245.

For cases on sale and purchase agreement, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3419–3430.

Cases referred to

Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

Foong Seong Equipment Sdn Bhd (receivers and managers appointed) v Keris Properties (PK) Sdn Bhd (No 1) [2009] 5 MLJ 381, CA (folld)

Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2013] 2 MLJ 650; [2013] 3 CLJ 813, CA (refd)

SEA Housing Corporation Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31, FC (folld)

Legislation referred to

Contracts Act 1950 s 56(2)
Housing Development (Control and Licensing) Act 1966 Schedule G

Appeal from: Suit No 22–314 of 2008 (High Court, Alor Setar)

Chuah Chung Ewe (Chang Chen Choong with him) (Syarikat Ng & Anuar) for the appellant.
Shamsul bin Jamil (Presgrave & Matthews) for the respondent.

Hamid Sultan JCA:

[1] The appellants/plaintiffs' appeal is in respect of the sale and purchase of a property based on the format of Schedule G of the Housing Development (Control and Licensing) Act 1966 ('HDA'). The appeal came up for hearing on 17 April 2013 and we allowed the appeal relating to the relevant prayers coupled with consequential directions. My learned brother Balia Yusof bin Hj Wahi JCA and my learned sister Lim Yee Lan JCA have read the judgment and approved the same.

[2] At the outset we must say that an appellate court will not ordinarily disturb the finding of facts of the trial court (see *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; [2013] 3 CLJ 813). However, if the law is not applied correctly on the facts of the case, appellate intervention is necessary and incumbent to sustain the integrity of the decision making process.

BRIEF FACTS

[3] The appellants and respondents are respectively the purchasers and vendors of the said property. The first respondent is the owner and the second respondent is the developer of the said property. The said property is subject to HDA terms. At the time of signing the sale and purchase agreement, the HDA terms require a 10% deposit to be paid by the purchaser. In the instant case the appellant only paid RM500 and the respondents have informed the appellant that they will collect the balance at a subsequent date. Even though the balance has not been collected the sale and purchase agreement had been duly executed by both parties. That is to say the written documents will confirm that 10% has been received ie to the disadvantage of the respondents.

[4] It is the appellant's case that they have gone several times to the respondents' place and the respondents had informed them they will notify when to pay the balance. Subsequently, by a letter dated 5 June 2008, which the appellants say was not correctly addressed AR registered was purportedly sent by the respondent to terminate the agreement that too without proper notice. The said letter of termination dated 5 June 2008, inter alia, reads as follows:

BY AR REGISTERED

Tarikh: 05-06-2008

Mr. Yee Hock Lai

Ms Liew Wei Nee

Batu 28 1/4, Jalan Padang Sanai

06300 Kuala Nerang

Kedah Darul Aman.

Encik/Tuan,

Per: Notis Penamatan

Hartanah: Lot 64 Bungalow Pokok Sena yang terkandung

Di dalam H.s.(M) 379 P.T. 512, Mukim Jabi, Daerah Pokok

Sena, Kedah

Kami merujuk kepada perkara yang tersebut di atas.

Kami telah diarahkan bahawa pada 19hb Januari, 2006 anda telah membayar wang deposit sebanyak Ringgit Malaysia Lima Ratus (RM500.00) sahaja untuk pembelian satu banglo yang dikenali sebagai Lot 64 Bungalow Pokok Sena yang mana deposit sebenar yang yang patut dibayar oleh anda adalah sebanyak Ringgit Malaysia Lapan Belas Ribu Enam Ratus Tujuh Puluh (RM18,670.00) sahaja.

Memandangkan anda telah gagal membayar baki wang deposit sebanyak Ringgit Malaysia Lapan Belas Riba Seratus Tujuh Puluh (RM18,170.00) sahaja, kami telah diarahkan untuk memberi Notis untuk menamatkan jual beli Lot 64 Bungalow Pokok Sena yang terkandung di dalam H.S.(M) 379 P.T. 512, Mukim Jabi, Daerah Pokok Sena, Kedah.

Bertarikh pada 5hb Jun, 2008.

Yang benar,

t.t.

……..

TAY CHAI HUAT

Peguambela & Pguamcara

s.k.: 1 Tetuan ABT Construction Sdn Bhd

No 6833, Jalan Bagan Jermal (Kg Gajah)

12300 Butterworth Pulau Pinang.

[5] Subsequent to the letter the appellants through their solicitors sent a letter dated 17 June 2008 attaching the balance deposit sum. The said letter dated 17 June 2008 reads as follows:

Date: 17/6/08

M/s Tay Chai Huat
Advocates & Solicitors
No. 69-A, Tingkat Satu
Bandar Baru Simpang Kuala
05400 Alor Star
Kedah Darul Aman.

By Fax/Hand
04-7729109

ABT Construction Sdn Bhd
No. 6833, Jalan Bagan Jermal (Kg Gajah)
12300 Butterworth.

By AR Registered

Dear Sirs,

Re: Termination Notice dated 5/6/2008

Hartanah: Lot 64 Bungalow Pokok Sena comprise in H.S.(M) 379

P.T. 512 Mukim Jabi Daerah Pokok Sena, Kedah Darul Aman.

We refer to the above matter whereby we act for Yee Hok Lai and Liew Wei Nee, the purchaser for Lot 64 Bungalow Lot according to Sale & Purchase Agreement dated 19/1/2006.

We have our dents' instruction to reply to M/s Tay Chai Huat's termination notice dated 5/6/2008 and state that our clients called and visited the Developer office on several occasions (i.e. March & November 2006, February & December 2007) to check on when to pay the balance of deposit however they were told not to pay until further notice. As such the termination notice is bad in law.

We enclose herewith the CIMB cheque no 355353 dated 17/6/2008 for the sum of RM18,170-00 payable to ABT Construction Sdn Bhd being the balance of the deposit.

Kindly acknowledge receipt hereof.

Thank you.

Yours faithfully

sgd

LIM YANG YANG

Advocate & Solicitor

c.c. Client

[6] The respondents refused to accept the sum and in addition proposed to increase the sale price and also an imposition to enter a new sale and purchase agreement which is evidenced by a letter dated 24 June 2008. The said letter reads as follows:

Date: 24-06-2008

Messrs Yang Lim & Co

No. 1518, First Floor

Lorong Padi, 0500 Alor Star

Kedah Darul Aman.

Dear Sir,

Re: Property: Lot 64 Bungalow Pokok Sena comprise in H.S.(M) 379 PT 512 Mukim Jabi, Daerah Pokok Sena, Kedah Darul Aman

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We refer to your letter dated 17th June, 2008 pertaining to the above matter.

Please be informed that ABT Construction Sdn Bhd was confirmed the selling price of the said property has been increased to RM233,800-00 due to the increment of the building cost as the structure and material of the said property was differ.

Please also be informed that in the event your client insists to purchase the abovesaid property, your client have to execute the Sale and Purchase Agreement at the purchase price of RM233,800-00 and pay 10% deposit sum of RM23,380-00 to ABT Construction Sdn Bhd.

As such, we return herewith your client's CIMB Cheque No. 355353 for the sum of RM18,170-00, for your further action.

Kindly acknowledge receipt.

Thank you.

Yours faithfully,

For Tay Chai Huat & Co

Sgd

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c.c. Tetuan ABT Construction Sdn Bhd

No 6581, Jalan Bagan Jermal (Kg Gajah)

12300 Butterworth, Pulau Pinang.

[7] On the face of the three letters, the conduct of the parties as well as the terms of the agreement will show mala fide on the part of the respondents

which no court should entertain, more so, when it relates a social legislation such as under the Housing Developers Act, etc support for the proposition is found in a number of cases to name a few are as follows: (a) *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31; (b) *Foong Seong Equipment Sdn Bhd (receivers and managers appointed) v Keris Properties (PK) Sdn Bhd (No 1)* [2009] 5 MLJ 381.

[8] Learned counsel for the appellants had filed a lengthy memorandum of appeal which is unnecessary but in substance has merits for reason of breach of HDA terms and also the conduct of the respondents which reflects mala fide which ought to have been dealt with by the learned judge in the right perspective. Learned counsel sought the prayers in the statement of claim which read as follows (in verbatim):

(a) Satu injunksi yang menahan atau melarang defendan-defendan sama ada dengan sendirinya, perkhidmatan-perkhidmatannya dan/atau agen-agennya dengan apa jua cara pun daripada menamatkan Perjanjian Jual Beli bertarikh 19-1-2006.

(b) Satu injunksi yang menahan atau melarang defendan-defendan sama ada dengan sendirinya, perkhidmatan-perkhidmatannya dan/atau agen-agennya dengan apa jua cara pun daripada menjual hartanah yang terkandung di H.S.(M) 379 PT 512 Mukim Jabi Daerah Pokok Sena, Kedah Darul Aman kepada pihak ketiga;

(c) Pelaksanaan spesifik Perjanjian Jual Beli bertarikh 19-1-2006 hartanah yang terkandung di H.S.(M) 379 PT 512 Mukim Jabi Daerah Pokok Sena, Kedah Darul Aman;

(d) Satu deklarasi bahawa plaintif-plaintif adalah berhak untuk memiliki hartanah yang terkandung di dalam H.S.(M) 379 PT 512 Mukim Jabi Daerah Pokok Sena, Kedah Darul Aman;

(e) Satu perintah bahawa sekiranya defendan pertama gagal/ enggan untuk melaksanakan pindahmilik hartanah yang terkandung di H.S.(M) 379 PT 512 Mukim Jabi Daerah Pokok Sena, Kedah Darul Aman kepada plaintif-plaintif, Penolong Kanan Pendaftar diberi kuasa atau dibenarkan untuk melakukan segala yang perlu untuk menyempurnakan pindah milik tersebut termasuk menandatangani borang pindahmilik 14A bagi defendan pertama;

(f) Ganti rugi am untuk ditaksirkan;

(g) Ganti rugi punitive dan teladan;

(h) Kos bagi permohonan ini ditanggung oleh defendan-defendan;

(i) Faedah;

(j) Lain-lain relief yang sua imanfaat oleh Mahkamah Yang Mulia ini.

[9] To save judicial time learned counsel for the appellants' complaint verbatim is repeated and, inter alia, reads as follows:

(a) the provision under the SPA, the respondents' own conduct and representation to request the appellants to pay the balance of 10% upon notification connote that the appellants' obligation to pay was only due upon the notification by the respondents;

(b) the said position is consistent with the notice of demand of balance of 10% issued by the respondents on 12 December 2006 ie 11 months after the SPA was signed. Nevertheless the said notice was sent by wrong mode and to the wrong address;

(c) the general principle is time would not be treated as of essence by merely mentioning in the contract. In order to give effect to the agreement the parties should show the intention and conduct towards the said commitment/agreement;

(d) the SPA in the present case is a standard form regulated under the Act/rules, so there is no evidence to show that parties actually intend to treat the time as of the essence;

(e) moreover, the respondents' own conduct and delay in demanding the balance of 10% after 11 months from the date of the SPA signed and terminating the SPA (after two years) can be interpreted as time is no longer of essence of the contract;

(f) if time is not an essence of the contract, the respondents are not entitled to rescind the contract but only claim for damages as provided under s 56(2) of the Contracts Act 1950;

(g) at the same time, according to Federal Court's case of *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597, when a contract contains a clause that time is of the essence and provides for liquidated damages as a remedy for the delay, the court will normally treat time as not of the essence. In the present case, cl 8 of the SPA provides interest for late payment in Third Schedule and cl 7 of the SPA — that time is of the essence of the contract; and

(h) cl 9(2) of the SPA also state clearly that upon the occurrence of any event in para 10(1)(a), (b), (c) or (d) the respondents shall give the appellant or in their solicitors not less than 14 days notice in writing by AR registered post to rectify the said breach, and the SPA shall only be treated as repudiated upon expiration of such period. The respondents have failed to issue any notification/reminder to the appellants as required under cl 9(b).

[10] Learned counsel for the respondents' submission is evasive on the issue

of termination clause, the termination notice which prima facie is in breach of termination terms and very importantly no explanation why the sale and purchase agreement was executed without the payment of 10% deposit as stated in the executed agreement.

[11] We have read the appeal record, the submission of the parties in detail. We take the view the appeal must be allowed and the order of the High Court dismissing the appellants' claim and allowing the respondents' counterclaim must be set aside. Our reasons, inter alia, are as follows:

(a) the procedure for termination is governed by cl 9 of the sale and purchase agreement which reads as follows:

> 9 Default by Purchaser and determination of the Agreement.
>
> (1) If the Purchaser
>
> (a) Subject to subclause (3) below, fails to pay any installment payable under clause 4(1) in accordance with the Third Schedule hereto or any part thereof and any interest payable under clause 9 for any period in excess of twenty-eight days after its due date;
>
> (b) Subject to subclause (3) below, fails to pay any sum or sums payable under this Agreement for any period in excess of twenty-eight (28) days after its due date; or
>
> (c) Commits any breach of or fails to perform or observe any material terms or conditions or covenants herein this Agreement; or
>
> (d) Before payment in full of the purchase price of the said property, commits an act of bankruptcy or enters into any composition or arrangement with his creditors or being a company, enters into liquidation, whether compulsory or voluntary,
>
> the vendor and the contractor may, subject to the sub-clause (2) hereof, annul the sale of the said property and forthwith terminate this agreement and in such an event
>
> (i) the vendor and the contractor shall be entitled to deal with or otherwise dispose of the said property in such manner as the vendor and the contractor shall see fit as if this agreement had not been entered into;
>
> (ii) the instalments previously paid by the purchaser to the vendor and the contractor, excluding any interest paid, shall be dealt with the disposed of as follows:
>
> (a) Firstly, all interests calculated in accordance with clause 9 hereof owing and unpaid shall be paid to the vendor and the contractor; and

(b) Secondly, a sum equal to ten percent (10%) of the purchase price thereof shall be forfeited to the vendor and the contractor; and

(c) Lastly, the residue thereof shall be refunded to the purchaser; and

(i) Neither party here shall have any further claim against the other for costs, damages, compensation or otherwise hereunder; and

(ii) Each party hereto shall pay its own costs in the matter.

(2) Upon the occurrence of any of the event set out in paragraph 10(1)(a), (b), (c), or (d) herein, the vendor and the contractor shall give the purchaser or his solicitors not less fourteen (14) days notice in writing by A.R. Registered post to treat this Agreement as having been repudiated by the purchaser and unless in the meanwhile such default and/or breach alleged is rectified or such unpaid instalments and interest are paid or subclause (3) hereof shall apply, this Agreement shall, at the expiration of the said notice at the option of the vendor and the contractor be deemed to be annulled.

(3) If the purchaser shall have before the expiry of the said fourteen (14) days notice obtained approval of the Loan and paid the difference between the purchase price and the loan and paid to the vendor and the contractor be undertaking letter from the Financier to release the loan to the vendor and the contractor, the vendor and the contractor then shall not annul the sale of the said property and terminate this Agreement unless Financier shall default in its undertaking to release the loan to the vendor and the contractor or fail to make the first disbursement of the loan to the vendor and the contractor within thirty (30) days from the expiry of the said fourteen (14) days notice.

[12] There was no judicial appreciation of cl 9 of the sale and purchase agreement and (a) the fact that the termination notice by the respondents does not satisfy the requirement of cl 9 of the agreement; and also (b) the relevant notice period before effective termination. Such failure to consider the contractual provisions and conduct of the parties relating to the contractual terms compromises the integrity of the decision making process and places the judgment as a perverse judgment requiring appellate intervention.

[13] For reasons stated above, we allowed the appeal in prayers (a), (b) and (c) subject to payment of full purchase price within four months, and prayer (e) subject to payment of full purchase price. (The other prayers were withdrawn by the appellants). The judgment of the High Court is set aside. The respondents to pay the appellants costs of RM15,000 and the court deposit to be refunded to the appellants.

[14] We hereby order so.

Appeal allowed with costs of RM15,000.

Reported by Kohila Nesan